No. 86-337

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

OKLAHOMA TAX COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. The principal question presented is whether the Tenth Circuit erred in holding that section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, which prohibits discriminatory state taxation of railroads, provides no remedy for discrimination resulting from overvaluation of railroad property unless the railroad can, before trial, make a "strong showing" of "purposeful overvaluation . . . with discriminatory intent."

II. A secondary question presented is whether, even if the Tenth Circuit's interpretation were correct, the courts below erred in dismissing Burlington Northern's complaint without a trial on the merits where there was a factual dispute as to discriminatory intent.

LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES

Burlington Northern Railroad Company:

- The Belt Railway Company of Chicago
- Burlington Northern Dock Corporation
- Burlington Northern (Manitoba) Limited
- Burlington Northern Railroad Properties Inc.
- Camas Prairie Railroad Company
- Clarkland Royalty, Inc.
- Davenport, Rock Island and North Western Railway Company
- The Denver Union Terminal Railway Company
- Houston Belt & Terminal Railway Company
- Iowa Transfer Railway Company
- Kansas City Terminal Railway Company
- Keokuk Union Depot Company
- The Lake Superior Terminal and Transfer Railway Company
- Longview Switching Company
- The Minnesota Transfer Railway Company
- Paducah & Illinois Railroad Company
- Portland Terminal Railroad Company
- The Saint Paul Union Depot Company
- Terminal Railroad Association of St. Louis
- Trailer Train Company
- Western Fruit Express Company
- The Wichita Union Terminal Railway Company
- Winona Bridge Railway Company
- Northern Radio Ltd.

BN Financial Services Inc.

BN Geothermal Inc.

BN Leasing Inc.

Burlington Northern Foundation

Burlington Northern International Services Inc.
- Burlington Northern Trading Company Inc.

Burlington Northern Motor Carriers Inc.
- BNMC Leasing Inc.

Burlington Northern Overseas Finance Company N.V.

Colt Intermodal Inc.

Glacier Park Company
- Dreyer Bros., Inc.
- Glacier Arizona Company
- Glacier Park Boulder Company
- Glacier Park Denver Company
- Glacier Park Orillia Company I
- Glacier Park Riverpoint Company
- Heritage Glacier Park Company
- Kalispell Glacier Park Company
- Tennessee Glacier Park Company

Glacier Park Liquidating Company

Meridian Minerals Company
- Granite Falls Rock
- Meridian Aggregates Company
- Saxony Corporation

M-R Holdings Inc.

M-R Holdings Acquisition Company

M-R Holdings Inc. No. 1 (Through No. 7)
- Southland Royalty Company
  - Southland Gathering Company
  - Southland Pipeline Company
  - SRC Production Company
    - SRC Realty Company

National Exchange, Inc.
- National Exchange Satellite, Inc.

New Mexico and Arizona Land Company
- NZ Development Corporation
- NZ Properties, Inc.

Plum Creek Timber Company, Inc.
- Plum Creek Foreign Sales Corporation

Research Applications Inc.

The El Paso Company
- El Paso Natural Gas Company
  - BEM Holding Corporation
  - El Paso Del Peru Company
  - El Paso Development Company
    - Ex-Mission Ranches, Inc.
    - Windjammer, Inc.
  - El Paso Gas Marketing Co.
  - El Paso Hydrocarbons Company
    - El Paso Frontera Corporation
    - El Paso Gas Transportation Company
    - El Paso Hydrocarbons Gas Processing Company
    - El Paso Hydrocarbons NGL Company
    - El Paso Hydrocarbons Pipeline Company
    - El Paso Hydrocarbons Service Company
    - El Paso Hydrocarbons Transportation Company
    - El Paso Storage Company
      - West Lake Natural Gasoline Company
    - Odessa Natural Gasoline Co.
    - Odessa Pipeline Company
    - Pecos Company
    - Trebol Drilling Company
  - El Paso Mojave Pipeline Co.
  - El Paso Natural Gas Building Company
  - El Paso Natural Gas Clearinghouse Company
  - El Paso Production Company
- Meridian Oil Holding Inc.
  - Meridian Oil Inc.
    - Butte Pipe Line Company
    - Meridian Oil Pipeline Company
    - Meridian Oil Trading Inc.
    - Northern Rockies Pipe Line Co.
    - Portal Pipe Line Company
  - Meridian Oil Production Inc.
    - EPX Company
  - Meridian Oil Services Inc.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The order and judgment of the Court of Appeals, which is not reported, appears in the Appendix to the Petition for Certiorari (Pet. App.) at 1a to 5a. The order of the United States District Court for the Western District of Oklahoma, which is also unreported, appears in Pet. App. at 6a to 17a.

JURISDICTION

The order and judgment of the Court of Appeals was entered on May 2, 1986. This Court granted the petition for writ of certiorari on October 20, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).[1]

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[1] On November 25, 1986, the time for filing of this Brief was extended to and including December 12, 1986.

STATUTORY PROVISION INVOLVED

Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 54 (codified at 49 U.S.C. § 11503 (1982)), is set forth in Pet. App. at 20a to 22a.[2]

STATEMENT OF THE CASE

1. Introduction

This case presents a fundamental question in the interpretation of section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act"). Section 306 declares discriminatory state taxation of railroad property to be an unreasonable burden on interstate commerce, and authorizes federal courts to provide relief from such discrimination.

The District Court, without a trial, dismissed Burlington Northern's complaint alleging that the Oklahoma taxing authorities had discriminatorily overvalued its railroad property.[3] The Court of Appeals affirmed, relying

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[2] Although the language of § 306 was modified when the provision was recodified in 1978 at 49 U.S.C. § 11503 (1982), the recodification effected no substantive change, and the original language is authoritative. Act of October 17, 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1337, 1466 (1978); H.R. Rep. No. 1395, 95th Cong., 2d Sess. 9-10 (1978); *see Richmond, F. & P. R.R. v. Department of Taxation*, 762 F.2d 375, 377 (4th Cir. 1985); *Southern Ry. v. State Board of Equalization*, 715 F.2d 522, 523 & n.1 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); *Clinchfield R.R. v. Lynch*, 700 F.2d 126, 128 n.1 (4th Cir. 1983). Accordingly, the Appendix to the Petition for Certiorari sets forth § 306 as originally enacted, and that language will be cited throughout this Brief.

[3] Respondents are the Oklahoma Tax Commission, the State Board of Equalization of the State of Oklahoma, and the respective members of those agencies: Odie A. Nance, Robert T. Wadley, J.L. Merrill, George Nigh, Spencer Bernard, Leo Winters, Jack Craig, Clifton Scott, Dr. Leslie Fisher and Mike Turpen. Jurisdiction in the District Court was premised on 49 U.S.C. § 11503 (1982), and 28 U.S.C. §§ 1331 & 1337 (1982).

on its own prior ruling that when state tax discrimination results from the overvaluation of railroad property, a federal court has no jurisdiction unless the railroad makes a strong pretrial showing of "'purposeful overvaluation . . . with discriminatory intent.'" Pet. App. 2a.

2. The Origin and Scope of Section 306

Throughout the two decades leading up to the passage of the 4-R Act in 1976, Congress wrestled with the distressed financial condition of the Nation's railroads. State tax discrimination against interstate railroads was a significant element both of the problems that led to the near collapse of the private rail industry, and of the solution Congress ultimately chose.

Attention was first focused by the 1961 "Doyle Report," which attributed the drastic decline of the railroad industry largely to outmoded federal and state laws and regulations.[4] Over the following years, both the financial troubles of the railroads and the need for federal intervention became increasingly acute.[5] Fifteen years after

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[4] Special Study Group on Transportation Policies in the United States, Senate Comm. on Commerce, National Transportation Policy, S. Rep. No. 445, 87th Cong., 1st Sess. (1961) [hereinafter Doyle Report]. The Report, over 700 pages in length, was issued under the staff direction of Major General John P. Doyle, and pursuant to three Senate resolutions of the 86th Congress.

The Doyle Report dealt extensively with discriminatory state taxation of railroads. *Id.* at 445-91. It initially recommended the complete exemption of railroad right-of-way from state taxation, and as an alternative suggested the antidiscrimination approach ultimately adopted in § 306. *Id.* at 463-66. See *infra* at 22-23 & n.32 for further discussion of the Report's findings.

[5] *See, e.g.*, Due, *A Comment on Recent Contributions to the Economics of the Railroad Industry*, 13 J. Econ. Literature 1315, 1315 (1975) (inadequate earnings of the railroad industry a problem "endemic for two decades"); Weinberg, *Working on the Railroad: An Urgent Agenda for Congress*, 20 N.Y.L.F. 731 (1975);

the Doyle Report, Congress enacted the 4-R Act.[6] In that legislation, the federal government took its first steps to strip away the layers of overregulation and discriminatory legislation that had helped reduce the railroads from the powerful monopolists of the nineteenth century to the weak links of the Nation's transportation system.[7]

One major feature of the 4-R Act was relief from state tax practices that imposed a disproportionate tax burden on railroad property.[8] Congress recognized that because interstate railroads are not adequately represented in local legislative bodies, and because their facilities cannot readily be relocated, they "are easy prey for State and local tax assessors." S. Rep. No. 630, 91st

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Prince, *Railroads and Government Policy—A Legally Oriented Study of an Economic Crisis*, 48 Va. L. Rev. 196, 202, 232 (1962) (railroad "financial crisis" due in part to discriminatory state taxation).

[6] The legislative history of the 4-R Act reveals that Congress intended to remedy a host of problems that had resulted in the bankruptcies of eight major railroads and had left virtually the entire industry in a precarious financial condition. S. Rep. No. 499, 94th Cong., 1st Sess. 2-3 (1975) [hereinafter S. Rep. No. 94-499]; H.R. Rep. No. 725, 94th Cong., 1st Sess. 53 (1975) [hereinafter H.R. Rep. No. 94-725]. Indeed, Congress was concerned that, without the relief embodied in the 4-R Act, the Nation's privately owned railroads might not survive. S. 2718, 94th Cong., 1st Sess. § 101(a) (1976); *see* S. Rep. No. 94-499 at 2-8 (1975).

[7] The 4-R Act was followed by the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, which provided the railroad industry significant additional relief from federal and state regulation. *See infra* at 2a.

[8] Various bills containing the substance of what became § 306 were considered over a span of more than a decade; the relevant legislative history thus includes committee reports and other materials predating the session of Congress during which the 4-R Act was passed. *Burlington Northern R.R. v. Lennen*, 715 F.2d 494, 497 (10th Cir. 1983), *cert. denied*, 467 U.S. 1230 (1984); *Trailer Train Co. v. State Board of Equalization*, 697 F.2d 860, 865 n.6 (9th Cir.), *cert. denied*, 464 U.S. 846 (1983).

Cong., 1st Sess. 3 (1969) [hereinafter S. Rep. No. 91-630]; *accord Transportation Act of 1972: Hearings Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 2d Sess., pt. 4 at 1244 (1972) (remarks of Rep. Adams). As a result of the discriminatory practices of many states, Congress ultimately estimated, "railroads [were being] over-taxed by at least $50 million each year." H.R. Rep. No. 94-725 at 78 (1975). For an industry whose net operating income in 1972 was found to have been only $835 million, *id.* at 80, this was a price the railroads—and the Nation—could no longer afford.

Section 306 was intended " 'to put an end to the widespread practice of treating for tax purposes the property of [railroads] on a different basis than other property in the same taxing district.' " S. Rep. No. 91-630 at 2 (1969). Subsection (1) declares that it is an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce for a state or political subdivision to:

> (a) assess railroad property at a value that bears a higher ratio to the true market value of such property than the ratio that the assessed value of all other commercial and industrial property bears to the true market value of such property (but only to the extent of the excess);
>
> (b) levy or collect any tax based on such an assessment;
>
> (c) levy or collect any ad valorem tax on railroad property at a higher rate than the rate generally applicable to other commercial and industrial property; or
>
> (d) impose any other tax that results in discriminatory treatment of a railroad carrier.

In adopting this antidiscrimination policy, Congress attacked the root cause of excessive state taxation of rail-

roads—their lack of local political representation—by tying the railroads' fate to that of other taxpayers.[9]

Because Congress was dissatisfied with the remedies available in state courts, it granted the federal courts jurisdiction over claims of state tax discrimination against railroad property, without regard to the amount in controversy or the citizenship of the parties and notwithstanding the Tax Injunction Act, 28 U.S.C. § 1341 (1982). Section 306(2) empowered the federal courts to "grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of . . . section [306]."

To protect the legitimate interests of the states, Congress placed four specific restrictions on the exercise of this new federal jurisdiction. First, "no relief may be granted . . . unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property." § 306(2)(c). Second, the "burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law." § 306(2)(d). Third, for determining the relationship between assessed value and the true market value of non-railroad property, a

[9] Since 1976, Congress has enacted substantially similar measures to protect motor carriers of property, Motor Carrier Act of 1980, Pub. L. No. 96-296, § 31, 94 Stat. 793, 823 (codified at 49 U.S.C. § 11503a (1982)); interstate bus lines, Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, § 20, 96 Stat. 1102, 1122 (codified at 49 U.S.C. § 11503a (1982)); and airlines, Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, tit. 5, § 532, 96 Stat. 671, 701 (codified at 49 U.S.C. app. § 1513(d) (1982)). The airline statute, unlike the others, does not provide federal court jurisdiction for discrimination claims. A case involving an unrelated issue under the airline counterpart of § 306 is presently before the Court in *Western Airlines v. Board of Equalization*, No. 85-732.

particular sampling method is prescribed. § 306(2)(e). Lastly, in order to enable the states to bring their taxation practices into compliance, Congress granted a grace period of three years before section 306 went into effect. § 306(2)(b).

State responses to section 306 have varied. In some instances, significant reforms have been instituted. In a number of cases, however, state and local taxing authorities have not responded appropriately but instead have attempted to perpetuate past discrimination through a number of devices.[10]

[10] *See, e.g., General American Transportation Corp. v. Kentucky*, 791 F.2d 38 (6th Cir. 1986) (railroad cars classified as public utility property and taxed at a higher rate of assessed value than other personal property); *Burlington Northern R.R. v. Bair*, 766 F.2d 1222, 1224-25 (8th Cir. 1985) (Iowa: taxation of railroad personal property without benefit of rollbacks and credits accorded to other personal property; overvaluation and undervaluation claims remanded for further findings of fact); *Louisville & N. R.R. v. Department of Revenue*, 736 F.2d 1495 (11th Cir. 1984) (Florida: tax benefit accorded to owners of other commercial and industrial property, but not to railroads); *Atchison, T. & S.F. Ry. v. Lennen*, 732 F.2d 1495, 1499 (10th Cir. 1984) (Kansas: railroad real property assessed annually, while other commercial and industrial real property assessed less frequently; remanded in part for further proceedings); *Clinchfield R.R. v. Lynch*, 700 F.2d 126, 130 (4th Cir. 1983) (North Carolina: railroad property assessed yearly to keep pace with inflation, while other real property reappraised and reassessed only every eight years); *Trailer Train Co. v. State Board of Equalization*, 697 F.2d 860 (9th Cir.) (California: additional lump-sum tax on railroad property remanded for findings concerning discrimination), *cert. denied*, 464 U.S. 846 (1983); *Alabama Great S. R.R. v. Eagerton*, 663 F.2d 1036 (11th Cir. 1981) (Alabama: license tax on railroads remanded for findings regarding discrimination); *Ogilvie v. State Board of Equalization*, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981) (North Dakota: taxation of railroad personal property but not other commercial personal property, and discriminatory assessment of railroad property); *Atchison, T. & S.F. Ry. v. Arizona*, 559 F. Supp. 1237 (D. Ariz. 1983) (improper classification of "other" commercial and industrial property relative to railroad property); *Louisville & N. R.R. v. Louisiana Tax Commission*, 498 F. Supp. 418 (M.D. La. 1980) (railroad property classified as "public service" property and

Tax discrimination is most obvious when a state applies different tax rates or different assessment ratios to railroad and non-railroad property.[11] Beyond this facial discrimination, unequal treatment can arise in at least two other ways. First, non-railroad property may be valued at *less than* its true market value (yielding "undervaluation"). Second, railroad property may be valued *in excess of* its true market value (yielding "overvaluation").[12] In either event, the practical result is a higher ratio of assessed value to true market value for railroad property than for non-railroad property. The issue in this case is whether and to what extent section 306 reaches claims of discrimination resulting from overvaluation of railroad property.

3. The Proceedings Below

Oklahoma's property taxation of railroads is based on an assessment made in the first instance by the Oklahoma Tax Commission (the "Tax Commission"), and submitted for approval by the State Board of Equalization (the "Board"). Okla. Stat. Ann. tit. 68, §§ 2443, 2454 (West 1966 & Supp. 1985). The assessment process involves several steps. The Tax Commission first estimates the full system value of the railroad's operating property both within and outside the State. Complaint ¶ 14, Pet. App. 26a-27a. This estimate is based on a weighted formula

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assessed at 25% of true market value, while "other" property assessed at 15% of value).

[11] Some measure of market value is the standard for valuation in all states where a property tax is imposed, but in most states the tax is applied to a percentage of market value rather than to full market value. That percentage is referred to as the "assessment percentage" or "assessment ratio," and the resulting taxable portion of full market value is termed the "assessed value" of the property. *See* S. Rep. No. 1483, 90th Cong., 2d Sess. 22-24 (1968) [hereinafter S. Rep. No. 90-1483].

[12] The decision below referred to challenges to this second form of discrimination as "valuation" claims. Pet. App. 2a. *See infra* note 18.

that considers historical costs of assets and capitalized net operating income. Response of Defendant Oklahoma Tax Commission to Complaint for Injunctive and Declaratory Relief, ¶ 14, Joint Appendix (J.A.) 16. The Tax Commission next allocates a portion of the railroad's full system value to the State, and then multiplies an assessment ratio or percentage against the allocated system value to arrive at the Oklahoma assessed value. Complaint ¶ 14, Pet. App. 26a-27a.[13] It is this assessed value that is distributed to the various Oklahoma counties in which the railroad operates, for application of the local tax rate.

For 1981, Oklahoma determined Burlington Northern's full system value to be $2.1 billion, of which 3.75% was allocated to the State. A 19% assessment ratio was applied to Burlington Northern's Oklahoma property, yielding a $15 million assessed value. Complaint ¶ 25, Pet. App. 29a-30a. A 1981 State study revealed, however, that other commercial and industrial property was assessed at only 10.87%. Complaint ¶ 27, Pet. App. 30a. The study thus established that the taxing authorities could not, consistent with section 306, continue applying the discriminatory 19% ratio to Burlington Northern.

For 1982, the tax year at issue in the present case, Oklahoma applied the same 10.87% assessment ratio to Burlington Northern's property that it used for other commercial and industrial property.[14] Simultaneously, however, the taxing authorities increased their valuation

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[13] This Oklahoma process is similar to that of most other states. Almost all states that apply a property tax to railroads do so on the basis of allocated full system value, using such factors as capitalized income, stock and debt values, and historical costs. *See generally* J. Runke & A. Finder, *State Taxation of Railroads and Tax Relief Programs* 23-32 (1977). In enacting § 306, Congress was aware that most states valued railroad property by this method. *See* S. Rep. No. 91-630 at 25 (1969); S. Rep. No. 90-1483 at 22 (1968).

[14] The 10.87% ratio for 1982 is not in controversy. Nor is the factor for allocation of full system value to Oklahoma in dispute.

of Burlington Northern's full system by 67%, from $2.1 billion to $3.5 billion. As a result, the ultimate 1982 assessment of petitioner's Oklahoma property was more than 90% of the 1981 assessment: $13.7 million versus $15 million. Complaint ¶¶ 25, 28, Pet. App. 29a-30a, 32a. The discriminatory result achieved in 1981 by the facially invalid use of a higher assessment percentage [15] was thus replicated in 1982 through the device of overvaluation. Complaint ¶ 36, Pet. App. 32a.

Following a timely protest of its 1982 property assessment,[16] Burlington Northern filed the present action in the District Court on March 3, 1983. The complaint contended that Oklahoma had violated section 306 by assessing the railroad's property for tax year 1982 at a ratio of assessed value to actual true market value much higher than the comparable ratio for other commercial and industrial property.[17] On March 25, 1983, respond-

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[15] Significantly, the District Court ultimately found that respondents had "violated § 11503 in years prior to 1982." Pet. App. 16a.

[16] *See* Complaint ¶¶ 31, 33, Pet. App. 31a. That state administrative protest remains pending.

[17] The following chart, using the figures taken from the Complaint, ¶¶ 25-40, Pet. App. 29a-32a, shows Oklahoma's steps in arriving at assessments of Burlington Northern for 1981 and 1982, together with what Burlington Northern contends its 1982 property assessment should have been if calculated on a nondiscriminatory basis under § 306.

	Oklahoma: 1981	Oklahoma: 1982	BN: 1982
Full system value	$2,107,321,200	$3,574,921,544	$1,495,253,000
Allocation to State	x 3.75%	x 3.53%	x 3.53%
= Allocated system value	$79,024,545	$126,194,733	$52,782,430
Assessment ratio	x 19%	x 10.87%	x 10.87%
= Assessed value	$15,014,650	$13,717,367	$5,737,450

Thus, the Complaint alleged that the ratio of assessed value to *correct* true market value for Burlington Northern's railroad prop-

ents moved to dismiss for want of subject matter jurisdiction and for failure to state a claim. On August 25, 1983, while those motions were pending, the Court of Appeals issued its decision in *Burlington Northern R.R. v. Lennen*, 715 F.2d 494 (10th Cir. 1983), *cert. denied*, 467 U.S. 1230 (1984). In *Lennen*, the Tenth Circuit held that section 306 was not intended to provide relief from de facto discrimination resulting from overvaluation of railroad property.[18] Although the court framed this rule categorically, it carved out a narrow exception permitting a railroad to challenge the state's determination of "true market value" if it could make a "strong showing" of "purposeful overvaluation . . . with discriminatory intent." *Id.* at 498.

Despite its disagreement with *Lennen*, Burlington Northern sought and obtained leave from the District Court to amend its complaint to include a more explicit allegation of discriminatory intent. Pet. App. 40a-41a. On March 1, 1984, Burlington Northern submitted a supplementary brief and statement of facts, together with affidavits, in opposition to respondents' motions to dismiss. J.A. 59.[19] On January 8, 1985, without further

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erty in 1982 was approximately 26% (assessed value of $13,717,367 divided by the correct allocated system value of $52,782,430), in contrast to the 10.87% assessment ratio for other commercial and industrial property. Complaint ¶ 40, Pet. App. 32a. The difference between 26% and 10.87% clearly exceeds the statutory 5% threshold for § 306 relief.

[18] The Tenth Circuit conceded that § 306 does encompass relief from de facto discrimination resulting from undervaluation of nonrailroad property, which it characterized as "equalization relief," but distinguished discrimination by overvaluation as "valuation relief." 715 F.2d at 497-98. The terms "equalization" and "valuation," as used by the Tenth Circuit, are not drawn from the language of § 306. The origin and precise meaning of these terms are unclear.

[19] Petitioner specifically stated that it was submitting its statement of facts and affidavits solely for the purpose of demonstrating

proceedings, the District Court granted respondents' motion to dismiss for want of subject matter jurisdiction. The court found that there was "a legitimate valuation dispute between the parties." Pet. App. 16a. Rejecting petitioner's demand for an evidentiary hearing, however, the court ruled that "there must be a strong showing of intentional discrimination whether the facts supporting the showing are disputed or not." Pet. App. 12a. Applying that standard, the court resolved a number of disputed factual issues in favor of the taxing authorities, relying solely on the conflicting affidavits of the parties.[20] Based on those findings, the District Court held that Burlington Northern had failed to present the requisite "strong showing" of purposeful overvaluation with discriminatory intent as to its 1982 Oklahoma property tax. Pet. App. 15a-16a.[21]

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the existence of a genuine issue of material fact regarding intent. J.A. 67-68. Burlington Northern requested that, if the District Court intended to decide any factual issues regarding jurisdiction, a full evidentiary hearing be held.

[20] In particular, the court rejected a key link in the chain of evidence showing discriminatory intent. Burlington Northern contended in its complaint and brief opposing the motion to dismiss that the taxing authorities had discriminatorily increased its system valuation from a 1981 level of $2.1 billion to a 1982 level of more than $3.5 billion solely to overcome the drop in the allowed assessment percentage from 19% to 10.87%. Complaint ¶¶ 25, 28, 36, Pet. App. 29a, 30a, 32a; J.A. 79-85. The District Court, however, accepted respondents' contention that the State's 1981 system value determination was actually higher than $3.5 billion, and thus that there was "nothing to indicate that system values were intentionally inflated to compensate for the reduced assessment ratio." Pet. App. 15a.

[21] When the District Court dismissed Burlington Northern's 1982 property tax case, it also dismissed the railroad's separate action with respect to its 1983 taxes. Pet. App. 17a. By order of April 29, 1985, however, the court reinstated Burlington Northern's 1983 claim. J.A. 125. The 1983 case has not yet been decided, and is not before this Court.

Burlington Northern appealed to the Tenth Circuit, and requested *en banc* review for the purpose of overruling *Lennen*. The United States and the Association of American Railroads filed briefs *amicus curiae* in support of that request. After the full Tenth Circuit denied the request for *en banc* consideration, the panel below affirmed the District Court's dismissal of the case. The court specifically ruled that the District Court could dismiss a section 306 complaint alleging discrimination resulting from overvaluation—without an evidentiary hearing of any kind—if it found the plaintiff's pretrial "showing" of discriminatory intent inadequate. Pet. App. 3a. Indeed, the Tenth Circuit panel effectively raised the jurisdictional intent threshold even above that of *Lennen* by requiring a showing of either facially discriminatory procedures or "state officials' remarks regarding an intent to discriminate in valuation." Pet. App. 3a-4a.

SUMMARY OF ARGUMENT

I. In the 4-R Act, Congress exercised its plenary authority under the Commerce Clause to prohibit all forms of state tax discrimination against railroads. Recognizing the crucial role played by property valuation and assessment in the state taxation process, Congress required states to equalize the ratios of assessed value to true market value for railroad property and all other commercial and industrial property. § 306(1)(a). Congress also specifically prohibited tax rate discrimination and adopted a catchall provision barring any other tax that results in discriminatory treatment of a railroad. § 306(1)(c), (d). Mindful of the historic inability or unwillingness of state agencies and courts to redress these abuses, Congress gave the federal courts jurisdiction to enforce section 306.

In the face of this clear statutory mandate, the Tenth Circuit ruled that the federal courts have no jurisdiction to hear claims of state tax discrimination resulting

from railroad property overvaluation, absent a showing of overt discriminatory intent. The effect of the Tenth Circuit's rule is essentially to make a state's determination of a railroad's true market value conclusive in federal court.

The statute itself refutes the Tenth Circuit's position. By its terms, section 306 authorizes federal courts to determine the proper assessed value and true market value of both railroad and non-railroad property, as a means of testing whether railroad property is being subjected to a disproportionate tax burden. § 306(1)(a). Nowhere does the statute indicate that the issue of the true market value of the railroad's property is to be treated any differently than other factual issues in a section 306 case. Indeed, the statute expressly provides that, in determining the true market value issue, the federal court must apply the burden of proof specified by state law. § 306(2)(d). Plainly, this explicit allocation of the burden of proof would have been unnecessary if true market value were not intended to be an issue in actions under section 306.

Nor did Congress require any showing of discriminatory purpose or intent. To the contrary, the statute speaks solely in terms of objective results. Indeed, as its chosen threshold for federal relief, Congress enacted an objective, five-percent discrepancy factor in the comparison of assessment-to-valuation ratios. § 306(2)(c).

By condoning a highly effective technique for state tax discrimination against railroads, the Tenth Circuit's interpretation of section 306 would defeat Congress' express purpose in enacting that law. Given the remedial objectives of section 306 and the clear mandate of its language, there is no support for reading into the statute an exception that would inevitably swallow the rule.

II. Where, as here, the language of the statute is unambiguous, resort to legislative history is unnecessary.

Yet if that record is examined, it emphatically confirms that Congress intended to provide federal court jurisdiction to hear section 306 claims involving railroad property overvaluation. Nothing suggests the necessity of proving discriminatory purpose or intent, either for section 306 claims generally or for overvaluation claims in particular. Indeed, Congress' model for this statute, former section 13(4) of the Interstate Commerce Act, was consistently interpreted to measure "discrimination" by reference to the objective economic impact of a state's actions rather than their purpose or intent.

III. Contrary to the premises of the Tenth Circuit, sound principles of federalism do not require any extra-statutory restriction on the scope of section 306. In exercising its powers under the Commerce Clause, Congress made important policy judgments balancing federal and state interests that should not now be second-guessed. *See Aloha Airlines v. Director of Taxation*, 464 U.S. 7, 14 & n.10 (1983). Section 306, with its built-in restrictions on federal relief, preserves the states' authority to levy property taxes and to experiment in their methods of doing so—provided they do not discriminate against interstate railroads.

Nor is concern about the burden on federal courts an appropriate reason to narrow the reach of the statute's remedial provisions. Experience to date offers no support for contending that federal courts will be swamped by a flood of railroad tax cases, or that they lack competence to decide these issues. Moreover, inferring additional restrictions on federal court jurisdiction would be inconsistent with Congress' intent to supplement existing state remedies it found inadequate. Congress chose this statute as the most efficient judicial remedy for a substantial national ill, and that judgment should be respected.

ARGUMENT

I. THE PLAIN LANGUAGE OF SECTION 306 PROHIBITS STATE TAX DISCRIMINATION RESULTING FROM OVERVALUATION OF RAILROAD PROPERTY, WITHOUT REGARD TO INTENT

A. Section 306 Reaches All Forms of Discrimination, Including That Resulting From Railroad Property Overvaluation

Under the Commerce Clause, U.S. Const., art. I, § 8, cl. 3, Congress has plenary authority to regulate interstate commerce, including authority to preempt or restrict state taxation of property engaged in interstate commerce. *E.g.*, *Aloha Airlines*, 464 U.S. at 12-14; *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979). Congress studied state property taxation of interstate railroads for over fifteen years, and concluded that discriminatory taxation was unduly burdensome and a serious threat to the railroads' financial survival. Having identified an evil of substantial duration, scope, and magnitude, Congress wrote a statute addressing the problem in its entirety. The plain language employed by Congress to eliminate state tax discrimination is fully adequate to resolve the issues presented in this case. *E.g.*, *Randall v. Loftsgaarden*, 106 S. St. 3143, 3150 (1986) (plain language controlling); *Aloha Airlines*, 464 U.S. at 11-12 (same).

Subsection (1)(a) of the statute prohibits discriminatory "assessment" of railroad property.[22] Giving practical definition to what constitutes a discriminatory assessment, the statute expressly provides that the ratio produced by the following calculation—

$$\frac{\text{assessed value of railroad property}}{\text{true market value of railroad property}}$$

[22] " '[A]ssessment' means valuation for purposes of a property tax levied by any taxing district . . . ." § 306(3)(a).

must not exceed the ratio produced by a second calculation—

$$\frac{\text{assessed value of commercial and industrial property}}{\text{true market value of commercial and industrial property.}}$$

This statutory formula necessarily requires the district court to determine the correct figures for both the numerator and denominator of each of the ratios. Nothing in the statute suggests that a district court lacks authority to decide any factual controversies regarding those numbers.

The statute's structure tracks the practical realities of state taxation of railroad property. In Oklahoma, as in most states, that process starts with a determination of the railroad's full system value across all states in which it operates. *See supra* at 8-9. Section 306 recognizes that discriminatory taxation of railroad property can arise not only from tax rates, but also from disproportionate valuation or assessment.

Further, subsection (1)(d), which was not even addressed by the courts below, prohibits "*any other tax* which results in discriminatory treatment" (emphasis added). In this broad catchall provision, Congress recognized the possibility of other methods of tax discrimination—possibly unimagined or subtler than those previously enumerated—and prohibited those other abuses as well. Whether or not a particular form of discrimination is specifically described, it is unlawful.

Notwithstanding the statute's clear and broad language, the Tenth Circuit held that a federal court may not hear claims of discrimination arising from railroad property overvaluation (at least absent manifest intent to discriminate) because the court may not determine the "true market value" of railroad property in order to decide whether discrimination has occurred. Pet. App. 2a; *Lennen*, 715 F.2d at 497. In effect, the Court of Appeals ruled that the "true market value" of railroad property—

the starting point for the entire taxation process—is whatever the state authorities say it is. In reaching this conclusion, the Tenth Circuit ignored most of the actual text of section 306 and misread the rest.

In ordinary usage, the term "true market value" denotes objective accuracy.[23] Notably, where the term is used elsewhere in the statute, it is to provide that "the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law." § 306(2)(d). If the "true market value" of railroad property were not an issue to be determined independently by the federal court, there would have been no reason for Congress to prescribe a burden of proof. Moreover, subsection 306(2)(d) establishes precisely the degree of deference due the state tax system, and stops well short of making the state's determination of value conclusive. Thus, the statute by its own terms authorizes federal court fact finding as to true market value, rather than blind acceptance of state calculations.[24]

The only textual basis for the Tenth Circuit's restricted statutory interpretation was its reading of subsection (2)(e). *Lennen*, 715 F.2d at 497. That provision sets forth two methods, including a sampling approach known as the "sales assessment ratio study," for determining the ratio of assessed value to true market value for non-railroad commercial and industrial property. The Court of Appeals reasoned that because Congress set forth a methodology for determining the true market value of commercial and industrial property but not railroad prop-

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[23] Unless otherwise defined, the words in a statute must be given their ordinary meaning. *See United States v. James*, 106 S. Ct. 3116, 3121 (1986) (citations omitted).

[24] The legislative history of § 306 confirms the statute's plain language on this point. *See infra* at 23-26.

erty, Congress did not intend the true market value of railroad property to be an issue at all. *Id.*[25]

This reasoning is fallacious. The task of determining assessed and true market values for the entire class of *all* non-railroad commercial and industrial property is a formidable one: a statistical sampling methodology was prescribed merely in order to make the task manageable. There was no need for Congress to prescribe a comparable methodology for railroad property, since nearly all states employ the allocated full system value method for valuing railroads. *See supra* note 13. Moreover, subsection (2)(e) is one in a series of *provisos* to the exercise of federal jurisdiction in section 306 cases. The absence of a proviso concerning proof of the true market value of railroad property—far from precluding that determination by federal courts—implies only that those courts should determine the value of railroad property as they normally resolve other factual issues.

The decision below directly undermines Congress' express objective of eliminating discriminatory state taxation of railroads. In effect, the Tenth Circuit has drawn a blueprint for discriminating against railroad property without triggering federal court review.[26] Overvaluation is an obvious way to discriminate against railroad property, and it is unthinkable that Congress would have left such a gaping hole in the statutory scheme without some express language to that effect.[27] In the absence of statu-

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[25] This mode of statutory analysis, commonly described by the phrase *expressio unius est exclusio alterius*, has been sharply criticized by this Court. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983).

[26] Moreover, the decision below potentially undercuts the protection Congress gave to other modes of transportation through statutes modeled on § 306. *See supra* note 9.

[27] Although bound by the *Lennen* rule, a district court in the Tenth Circuit recently observed that, "[a]s long as its figures can escape review, a state can discriminate more effectively against a

tory language precluding any challenge to a state's valuation of railroad property, this Court should not attribute to Congress a futile act. *See United States v. Bisceglia*, 420 U.S. 141, 150 (1975).[28]

B. Section 306 Contains No Requirement of Discriminatory Intent

Not one word of section 306 suggests that a railroad must show an official purpose or intent to discriminate.[29] The statute takes a practical economic approach to defining discrimination, rather than looking to the subjective motivation or intent of state administrators. The text of section 306 speaks not of intent, but of "action[s]" constituting discrimination against interstate commerce, and of "prohibited acts." § 306(1). Moreover, subsection (1)(d) specifically prohibits "[t]he imposition of any other tax which results in discriminatory treatment" of a railroad, plainly looking to impact rather than purpose.[30]

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railroad by overvaluing it than it can by assessing it at a higher rate." *Union Pacific R.R. v. State Tax Commission*, 635 F. Supp. 1060, 1068 (D. Utah 1986). There is significant evidence that Wyoming, another state within the Tenth Circuit, has already picked up the cue from the Court of Appeals: Burlington Northern's assessed valuation for its Wyoming property more than doubled from 1985 to 1986. Pet. App. 81a, 83a.

[28] Respondents contend that, if construed to permit claims of railroad property overvaluation, § 306 would run afoul of this Court's decision in *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 752 (1961). Respondent's Brief in Opposition to Petition for Writ of Certiorari at 7-8. However, § 306 explicitly invalidates only the *excessive* portion of a discriminatory tax. When a federal court applies this specific congressional standard, *Moses Lake Homes*, which dealt with a tax held to be invalid in its entirety, 365 U.S. at 751-52, is inapposite.

[29] Nor does any intent requirement appear in the Tax Injunction Act, 28 U.S.C. § 1341, upon which the Tenth Circuit relied in support of its restricted reading of § 306. *Lennen*, 715 F.2d at 498.

[30] Notably, those federal courts of appeals outside the Tenth Circuit that have found it necessary to consider whether § 306 requires a showing of intent have been unanimous in concluding that it does not. *Atchison, T. & S.F. Ry. v. Board of Equalization*, 795 F.2d 1442, 1446-47 (9th Cir. 1986), *petition for rehearing pending on other grounds; General American Transportation Corp. v. Kentucky*, 791 F.2d 38, 42 (6th Cir. 1986); *Burlington Northern R.R. v. Bair*, 766 F.2d 1222, 1226 (8th Cir. 1985); *Louisville & N. R.R. v. Department of Revenue*, 736 F.2d 1495, 1498 (11th Cir. 1984).

The Tenth Circuit's intent standard appears to be premised upon its belief that, as a matter of policy, some limit should be placed on the power of the federal courts to review state valuation decisions. This led the Court of Appeals to adopt a threshold test designed to exclude overvaluation claims in virtually all cases. In section 306, however, Congress established a significant, but not insurmountable, threshold test of its own. Before federal relief can be triggered, subsection 306(2)(c) requires at least a five percent discrepancy between the state's assessment ratios for railroad property and other property. The court below thus substituted its own policy judgment for that of Congress, superimposing upon an objective and workable statutory standard another that lacks any foundation whatsoever.[31]

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[31] In addition to imposing a rule requiring a threshold showing of intent, the courts below applied that rule in a manner that effectively deprived petitioner of any opportunity to make the intent showing. In granting respondents' motion to dismiss, the District Court erroneously treated "discriminatory intent" as a jurisdictional issue, rather than at most an element of the claim for relief. *See* Fed. R. Civ. P. 12(b)(1), (6); *Bell v. Hood*, 327 U.S. 678, 682-83 (1946). Even if intent were a "jurisdictional" matter, it was one so intertwined with the merits of the case that it was improper to dismiss the claim prior to a trial on the merits. *Id.* at 682-85. In the face of material issues of fact as to overvaluation and intent, *see supra* notes 17, 20, the District Court clearly erred in granting the motion to dismiss without an evidentiary hearing. *See Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977).

II. THE LEGISLATIVE HISTORY OF SECTION 306 CONFIRMS THAT THE STATUTE ENCOMPASSES RAILROAD PROPERTY OVERVALUATION

Confronted with a clear prohibition against all discriminatory state taxation, the Tenth Circuit turned to legislative history to support its constricted reading of the statute. Given the clarity of section 306, resort to legislative history was almost certainly unnecessary. *See, e.g., Aloha Airlines*, 464 U.S. at 12 (no need to review legislative history when the plain language of the statute forbids a state tax on interstate commerce); *Ex parte Collett*, 337 U.S. 55, 61 (1949). In any event, the legislative record overwhelmingly confirms that section 306 encompasses discrimination against railroads resulting from overvaluation of their property. There is no evidence that Congress consciously chose to exclude overvaluation claims from the scope of section 306, or meant to limit such relief to cases of purposeful overvaluation with discriminatory intent.

A. The Legislative History Demonstrates That Congress Expected Railroad Property Valuation To Be Determined by the Federal Courts in Section 306 Cases

The reports and hearings on the bills that preceded section 306 demonstrate that relief from discriminatory state overvaluation of railroad property was an integral part of the solution Congress enacted. At the very outset of the legislative effort to eliminate discriminatory state taxation of railroads, the landmark Doyle Report detailed the harm caused to railroads by discriminatory state valuation practices. Doyle Report at 452-59.[32] The Report's findings, echoed over the years as grounds for

[32] The Report recognized, for instance, that: (1) actual state assessment practices, even where state law mandates a pre-established assessment ratio, frequently result in inequitable treatment of railroads, *id.* at 454; (2) "the concept of value" is fundamental to property taxation, and differences over values lead to "creeping inequity" against railroads, *id.*; (3) states have used the historical cost method of valuation of railroad property to "justify a higher full value which will in turn appear to produce a lower equalized assessment ratio," *id.* at 456-57; and (4) in the absence of legislated standards, courts have regrettably committed valuation issues to the discretion of state officials, *id.* at 458-59.

section 306,[33] thoroughly refute any notion that Congress overlooked valuation issues, or meant to defer to the states with respect to those issues.

Seven years after the Doyle Report, following hearings on a direct predecessor of section 306, a Senate Committee concluded that the proposed legislation "is needed, is appropriate, and *adequate to accomplish the intended purpose of eliminating discriminatory taxation.*" S. Rep. No. 90-1483 at 8 (1968) (emphasis added). Clearly, Congress did not intend to leave untouched such an obvious method of discrimination as overvaluing railroad property. Indeed, a dissenting Senator attached a statement to that report objecting to the breadth of the bill, and making its meaning even clearer: "Under S. 927, *a Federal court will necessarily be required to review State valuation principles and procedures* in order to determine whether carrier operating property is assessed at a percentage of true market value that is higher than the assessment percentage of all other property." *Id.* at 26 (remarks of Sen. Lausche) (emphasis added).

Twice during the legislative process, the Interstate Commerce Commission, the federal agency most directly concerned with railroad issues, manifested its own understanding that the proposed prohibition of state tax discrimination encompassed issues of true market value:

> It appears that H.R. 4972 is intended to shift the final determination of "true market value" of carrier

[33] The Doyle Report was cited frequently in later legislative history. *See, e.g.*, S. Rep. No. 91-630 at 5, 20 (1969); S. Rep. 90-1483 at 3-4 (1968); 113 Cong. Rec. 2909 (1967) (remarks of Sen. Magnuson).

> property, as well as that of other property in a taxing district, from State courts to U.S. district courts.[34]

Along the same lines, the Bureau of the Budget observed that the legislative proposal would shift final determination of the true market value of railroad property "from state courts to U.S. district courts." *House Hearing of 1964* at 5 (letter of Phillip S. Hughes, Assistant Director for Legislative Reference). If Congress had meant "true market value" to be whatever number the state used as the departure point for taxation, without permitting an opportunity to prove true market value independently in federal court, it would have been easy enough to define the term accordingly. In fact, as early as 1969 an amendment was suggested by the State of Washington that would have done just that,[35] but despite seven more years of legislative consideration, no such amendment was ever adopted.

Against this authoritative legislative history confirming federal court jurisdiction with respect to overvaluation claims, respondents have seized upon isolated oral

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[34] *Tax Assessments on Common Carrier Property: Hearings on H.R. 4972 Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. 3 (1966) [hereinafter *House Hearings of 1966*] (letter from Chairman John W. Bush); *accord Tax Assessments on Common Carrier Property: Hearing on H.R. 736, H.R. 10169 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 88th Cong., 2d Sess. 2 (1964) [hereinafter *House Hearing of 1964*] (letter from Chairman Abe McGregor Goff).

[35] *State Tax Discrimination Against Interstate Carrier Property: Hearing on S. 2289 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 98 (1969) [hereinafter *Senate Hearing of 1969*] (letter from George Kinnear, Director, State of Washington Dep't of Revenue); *cf. Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 220 (1983) (improper to adopt a statutory reading that Congress considered and rejected).

comments by two individuals from the private sector.[36] This is perhaps the least reliable form of legislative history, to be given virtually no weight.[37] In any event, those few ambiguous comments are outweighed by numerous explicit statements of responsible state officials that the contemplated legislation *would* authorize judicial determination of the true market value of railroad property.[38]

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[36] The witness on whom respondents rely most heavily, Philip Lanier, was counsel to the Louisville & Nashville Railroad in the 1960's, and was one of the witnesses who appeared on behalf of the Association of American Railroads. Respondents' Brief in Opposition to Petition for Writ of Certiorari 6-7 & n.9. Respondents quote selectively from portions of Mr. Lanier's oral testimony, at most a fraction of the many days of hearings held on the proposed legislation over years of deliberation.

[37] *See, e.g., McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 493-94 (1931).

[38] *See Senate Hearing of 1969* at 98, 99 (letter from George Kinnear, Director, State of Washington Dep't of Revenue) (bill would require federal courts "to review and determine the correctness of . . . actual valuation results for carriers" and "to determine de novo the true market value of transportation property"); *id.* at 103, 104 (letter from Houston Flournoy, Controller, State of California) (bill would commit "entire review process" for railroad taxation to federal courts, involving them in "complex valuation problems"); *Discriminatory Taxation of Common Carriers: Hearings on S. 927 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. 110, 114 (1967) (prepared statement of Charles F. Conlon, Exec. Sec'y, NATA, appearing on behalf of 24 states) (to determine the actual assessment ratio, the federal court must first "decide whether property has been correctly valued"); *id.* at 122 (letter from Mills E. Godwin, Jr., Governor of Virginia) (bill would require district courts to establish "true market values" for both common carrier transportation property and all other property); *id.* at 128 (prepared statement of Fred O. (Bud) Dickinson, Jr., Comptroller, State of Florida) (bill would necessarily require "federal courts to review the valuation of carrier property"); *House Hearings of 1966* at 91, 92 (statement of Earl Berry, Director, Tax Division, Arkansas Public Service Comm'n) (federal courts will determine fair market value); *id.* at 122, 123 (statement of George J. Dworak,

There is no suggestion that Congress diluted the impact of the proposed legislation at any time between the reports and hearings of the late 1960's and the ultimate enactment of section 306. To the contrary, the bills that led to enactment were *strengthened* by addition of the catchall prohibition against all other forms of discrimination, well after the comments upon which respondents seek to rely.[39] In addition, the provision prescribing a burden of proof for determining true market value was added late in the legislative process, reaffirming Congress' recognition that true market value would be a factual issue in section 306 cases. *See* S. Rep. 94-499 at 65 (1975); *accord* S. Conf. Rep. No. 94-595 at 166 (1976).

This extensive record of congressional understanding that the valuation of railroad property would be an issue is capped by an express statement in the final House report prior to passage of the 4-R Act:

Nebraska State Tax Commissioner) (state courts more experienced than federal courts in determining necessary valuations); *id.* at 142, 143 (letter from Alan Cranston, Controller, State of California) (bill would redirect "whole review process" for railroad taxation, including valuation determinations for railroad property, into federal courts); *see also Senate Hearing of 1969* at 59 (statement of Broley E. Travis, Consulting Valuation Engineer, testifying in favor of the proposed legislation).

[39] The catchall provision first appeared in H.R. 12891, introduced February 19, 1974, 93d Cong., 2d Sess., and was part of the bill (S. 1149 as amended) passed by the House in December of that year. The expansive scope of the catchall provision was described in the Conference Report. *See* S. Conf. Rep. No. 595, 94th Cong., 2d Sess. 166 (1976) [hereinafter S. Conf. Rep. No. 94-595]. *See also Burlington Northern R.R. v. Bair*, 766 F.2d 1222, 1224 (8th Cir. 1985); *Richmond, F. & P. R.R. v. Department of Taxation*, 762 F.2d 375, 379 (4th Cir. 1985); *Alabama Great S. R.R. v. Eagerton*, 663 F.2d 1036, 1040-41 (11th Cir. 1981); *Ogilvie v. State Board of Equalization*, 657 F.2d 204, 209-10 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981).

> This section [section 306] amends Part I of the Interstate Commerce Act to include a new section which would make unlawful discriminatory ad valorem state or state subdivision taxation activities. Such tax practices include: (1) *overvaluation* . . . .

H.R. Rep. No. 94-725 at 113 (1975) (emphasis added).[40] The Tenth Circuit's effort to exclude virtually all overvaluation claims from the ambit of section 306 is thus contrary to Congress' express goals and expectations, creating a loophole that threatens to destroy the entire remedial scheme.[41]

B. The Legislative History Contains No Suggestion of an Intent Standard

There is no legislative history to support a requirement under section 306 of purpose or intent to discriminate. Indeed, both the statute and its legislative history are

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[40] Although the Senate version of the bill was ultimately adopted in conference, S. Conf. Rep. No. 94-595 at 166 (1976), the relevant language of the House bill is essentially identical to the Senate bill, and there is no indication in any of the reports that the Conference Committee differed with the House's interpretation of that language.

[41] By barring railroad property overvaluation claims from the federal courts, the Tenth Circuit's ruling undermines § 306 in another way. The legislative history clearly demonstrates that Congress meant to ensure railroads an effective central forum for determination of all claims of discriminatory state taxation practices. H.R. Rep. No. 94-725 at 77 (1975). In some instances, because of the decentralized nature of property tax collection, a railroad was previously required to bring suit in dozens of local courts or agencies; in other instances, railroads suffered the disadvantage of not being able to enjoin the discriminatory tax while its validity was being determined. *Id.* Moreover, the relief available in state court was often less effective than § 306 relief because many state courts reviewed assessment decisions under very lenient standards. By providing a central federal forum, Congress intended to streamline the remedial system for the railroads and avoid costly and repetitive litigation over these issues.

inconsistent with the use of a subjective test for determining the existence of prohibited discrimination.

First, the many reports and other sources of legislative history focus on bottom-line fiscal and financial results.[42] Congress' overriding concern was with the revenue losses imposed on railroads by discriminatory state taxation. S. Rep. No. 91-630 at 9 (1969). A state tax that discriminates against railroads will have that adverse revenue effect regardless of the intent of the taxing authorities.

Second, Committee reports on close predecessors of section 306 stated that "[p]recedent" for the bill's definition and prohibition of "unjust discrimination" against interstate commerce was to be found in former section 13(4) of the Interstate Commerce Act. S. Rep. No. 91-630 at 9 (1969); S. Rep. No. 90-1483 at 9 (1968). Section 13(4) empowered the Interstate Commerce Commission to set aside state-approved intrastate rates that discriminated against interstate commerce.[43] The reports on section 306 reasoned that, like burdensome state regulation of intrastate rates, discriminatory state property taxation siphons off the resources of interstate carriers. S. Rep. No. 91-630 at 9 (1969); S. Rep. No. 90-1483 at 9 (1968).

The intended parallel is significant because section 13(4) was never interpreted to require a showing of discriminatory intent. In proceedings under section 13(4) in which it was alleged that intrastate rates discriminated against interstate commerce, the focus of the Interstate Commerce Commission and reviewing courts in measuring such discrimination was consistently and exclusively upon economic analyses of differences between comparable in-

[42] *E.g.*, S. Rep. No. 91-630 at 5 (1969); S. Rep. No. 90-1483 at 4 (1968); Doyle Report at 487 (1961).

[43] The Appendix to this Brief sets out § 13(4) as it existed at the time of the reports.

trastate and interstate rates and the costs and conditions of service covered by those rates.[44] By using section 13(4) as its model for section 306, Congress implicitly adopted the objective standard of section 13(4), and clearly did not contemplate a requirement that plaintiffs demonstrate discriminatory motives or intentions on the part of state officials.[45] In sum, the legislative history of the statute confirms that discriminatory impact resulting from overvaluation of railroad property is sufficient to justify federal judicial relief.

III. THE TENTH CIRCUIT'S INTERPRETATION OF SECTION 306 UPSETS THE BALANCE CONGRESS STRUCK BETWEEN STATE TAXATION AND THE FEDERAL INTEREST IN PROTECTING INTERSTATE COMMERCE

As the Doyle Report recognized, this Court has frequently invoked the need for congressional guidance concerning state taxation of interstate commerce. Indeed, the Report drew upon Justice Frankfurter's observation that:

> The solution to these problems [of state taxation of interstate commerce] ought not to rest on the self-

[44] *E.g.*, *King v. United States*, 344 U.S. 254, 274 (1952) (jurisdiction under § 13(4) not limited to confiscatory intrastate rates; economic evidence of unjustified discrepancy between intrastate and interstate rates sufficient to support § 13(4) relief); *Illinois Commerce Commission v. United States*, 292 U.S. 474, 484 (1934) (upholding § 13(4) relief based on analysis of economic effects of intrastate switching rates); *Oklahoma Corp. Commission v. United States*, 388 F. Supp. 4 (N.D. Okla. 1974) (intrastate rates invalidated based on expert witness testimony); *Oklahoma Corp. Commission v. United States*, 235 F. Supp. 803 (W.D. Okla. 1964); *see Houston, E. & W. Tex. Ry. v. United States (The Shreveport Rate Case)*, 234 U.S. 342 (1914).

[45] Significantly, when called upon to construe statutes analogous to § 306 in their proscription of state taxation of interstate commerce, this Court has not required a showing of purpose or intent to burden interstate commerce. *Aloha Airlines*, 464 U.S. 7 (Airport Development Acceleration Act of 1973); *Arizona Public Service Co.*, 441 U.S. 141 (15 U.S.C. § 391).

> serving determination of the States of what they are entitled to out of the Nation's resources. Congress alone can formulate policies founded upon economic realities . . . .

Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 477 (1959) (Frankfurter, J., dissenting) (quoted in part in the Doyle Report at 473).[46] Problems of discrimination, misapportionment, and multiple burdens imposed by state taxation have long plagued our federal system. Until recently, Congress seldom chose to exercise its plenary power in this area, apparently preferring to leave problems to be resolved by state courts, with constitutional oversight by this Court.

In the 4-R Act, however, Congress deliberately concluded that federal action was necessary to address a specific national problem resulting from discriminatory state taxation—that affecting the railroad industry. Section 306 represents a carefully considered balancing of federal and state interests: it protects the railroads, and their vital contribution to interstate commerce, from discriminatory treatment, while preserving the powers of the states to continue nondiscriminatory taxation.

Recognizing the important policy goals of section 306, all federal courts of appeals save the one below have construed it in accordance with Congress' broad remedial intentions. The Eleventh Circuit, for instance, has observed that section 306 embodies "a general concern with discrimination in *all* of its guises." *Southern Ry. v. State Board of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) (emphasis added); *see Eagerton*, 663 F.2d at 1040. The Fourth

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[46] *See also* 358 U.S. at 457 (absence of congressional regulation leading to litigation); *McCarroll v. Dixie Greyhound Lines*, 309 U.S. 176, 188-89 (1940) (Black, J., dissenting) (articulating need for congressional control over state taxation of interstate commerce) (quoted in the Doyle Report at 473).

Circuit has found that the statute "clearly and unambiguously prohibits all forms of discriminatory taxation of railroads." *Richmond, F. & P. R.R. v. Department of Taxation*, 762 F.2d 375, 379 (4th Cir. 1985). Similarly, the Eighth Circuit has held that section 306 prohibits state tax discrimination against railroads "in any form whatsoever." *Ogilvie v. State Board of Equalization*, 657 F.2d at 210; *see Trailer Train Co. v. State Board of Equalization*, 710 F.2d 468, 472 & n.6 (8th Cir. 1983).

Apart from the Tenth Circuit, the courts of appeals have also agreed that discrimination resulting from overvaluation claims must fall within section 306. In *Burlington Northern R.R. v. Bair*, 766 F.2d 1222, 1226 (8th Cir. 1985), the court held that section 306 reaches claims of overvaluation or undervaluation without regard to intent or purpose. Otherwise, the Eighth Circuit reasoned, states would retain a free hand to discriminate against railroads by assessing excessive values, and the statute would become "a mere shadow" of what it was meant to be. *Id.* at 1225-26. To the same effect, the Ninth Circuit ruled unequivocally that "federal courts have jurisdiction over claims of rail property overvaluation," without any requirement that purpose or intent to discriminate be shown. *Atchison, T. & S.F. Ry.*, 795 F.2d at 1446. These decisions have served to preserve the integrity of section 306 as a major part of our national transportation policy.

The Tenth Circuit alone has restricted the substantive scope of the statute. That court was "unwilling to infer that [Congress] intended district courts to sit as state tax assessment boards for railroad property," based on its perception that federal court overvaluation determinations "would impose significant burdens on district courts and would substantially thwart the tax collection process of states." *Lennen*, 715 F.2d at 498; Pet. App. 2a. What this amounts to is second-guessing Congress on the critical policy choices it made in enacting section 306. A host of issues pertaining to federal-state rela-

tions were addressed in the legislative record before Congress rendered its considered judgment. If anyone is to reconsider that judgment, it must be Congress itself. *See Aloha Airlines*, 464 U.S. at 14 & n.10.

In any event, the Tenth Circuit's fears are based on a distorted view of what section 306 review of railroad property overvaluation actually involves, and of its impact on state tax collection. To be sure, calculation of the excessive and unlawful portion of the state tax will require, *inter alia*, a judicial determination of the true market value of railroad property. That determination, however, is unlikely to create any unusual difficulty for federal courts. In Oklahoma and almost all other states, valuations of railroad property are based on the allocated full system value method. That valuation method inquires into such system-wide financial matters as historical costs and capitalization of earnings, and judicial review ordinarily turns on expert testimony. No parcel-by-parcel valuation of properties is required, and no peculiarly local knowledge or special expertise is necessary. Accordingly, there is no reason to believe that federal courts are not competent to resolve valuation disputes in the course of deciding whether state taxes are discriminatory.[47] As to preserving the integrity of state and local functions, the determination of objective economic facts is certainly less intrusive than inquiring into state officials' thought processes for evidence of discriminatory purpose or intent.

Nor will tax discrimination claims involving railroad property overvaluation be likely to "overburden" the federal courts. Given the perennial failure of administrative boards and state courts to supply any adequate remedy for state tax discrimination against interstate commerce, section 306 represents a well-measured commitment of federal judicial resources.[48] In any event, in the nearly eight years since section 306 became effective, federal courts have issued reported decisions in only about thirty separate cases under the statute.[49] Of these, fewer than a dozen have involved claims of railroad property overvaluation.[50] Moreover, once states come to understand better the broad mandate of section 306, it is reasonable to expect that even the presently moderate level of litigation will subside.

On the other hand, should discrimination resulting from overvaluation of railroad property be held immune from federal review under section 306, the states will have been given a master plan for evading the statute. The likely result would be an explosion of state court litigation concerning railroad overvaluation. In view of the historic hostility of state courts to railroads with respect to state property taxes, this Court would once again be left as the last and only meaningful line of defense against a serious burden on interstate commerce.

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[47] Prior to the passage of § 306, the fair market value of railroad property arose on occasion as a constitutional issue before this Court. *E.g. Norfolk & W. Ry. v. Missouri State Tax Commission*, 390 U.S. 317 (1968). In addition, federal district courts routinely make determinations of fair market value in such fields as federal estate and gift tax, and fiduciary duties in stock transactions.

[48] Moreover, by reducing the need for duplicative and extended state court proceedings, § 306 fosters overall judicial economy. *See supra* note 41.

[49] Many of these cases have been consolidated for trial or appeal.

[50] *Atchison, T. & S.F. Ry.*, 795 F.2d 1442; *Bair*, 766 F.2d 1222; *Southern Ry.*, 715 F.2d 522; *Lennen*, 715 F.2d 494; *Union Pacific R.R.*, 635 F. Supp. 1060; *Atchison, T. & S.F. Ry. v. Arizona*, 559 F. Supp. 1237 (D. Ariz. 1983). Reprinted in the Appendix to the Petition for Certiorari are two unreported decisions in other cases involving overvaluation claims: *Union Pacific R.R. v. Department of Revenue*, Nos. 85-2102LE, 85-2103LE (D. Or. May 6, 1986), Pet. App. 77a-80a (order denying motion to dismiss); *Burlington Northern R.R. v. Department of Revenue*, No. C85-767T (W.D. Wash. Oct. 25, 1985), Pet. App. 71a-76a (order granting preliminary injunction).

In sum, section 306 should be interpreted to prohibit all forms of state tax discrimination against railroads, including discrimination resulting from overvaluation of railroad property. Such a construction furthers the statute's remedial objectives while respecting the balance Congress struck between state and federal interests. States will remain free to adopt their own methods of taxation, and to experiment with those methods as they see fit. What this interpretation of section 306 will *not* permit is a return to the era in which states felt free to impose discriminatory taxes on interstate railroads at the expense of those who depend upon the Nation's interstate transportation system. The limited but vital federal intervention mandated by section 306 is well within the power of Congress, and there is no reason to give the statute anything less than its plain meaning.

CONCLUSION

This Court should reverse the order and judgment of the Court of Appeals, and the case should be remanded to the District Court for trial of Burlington Northern's section 306 claim of tax discrimination resulting from overvaluation of its railroad property, without any requirement to show discriminatory purpose or intent.

Respectfully submitted,

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APPENDIX

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Prior to 1976, section 13(4) stated (emphasis added):

> Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or *any undue, unreasonable, or unjust discrimination against, or undue burden on, interstate or foreign commerce* (which the Commission may find without a separation of interstate and intrastate property, revenues and expenses, and without considering in totality the operations or results thereof of any carrier, or group or groups of carriers wholly within any State), which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, discrimination, or burden: Provided, That upon the filing of any petition authorized by the provisions of paragraph (3) of this section to be filed by the carrier concerned, the Commission shall forthwith institute an investigation as aforesaid into the lawfulness of such rate, fare, charge, classification, regulation, or practice (whether or not theretofore considered by any State agency or authority and without regard to the pendency before any State agency or authority of any proceeding relating thereto) and shall give special expedition to the hearing and decision therein. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby,

the law of any State or the decision or order of any State authority to the contrary notwithstanding.

Section 13(4) was ultimately superseded by section 214 of the Staggers Rail Act of 1980, which expanded federal control over intrastate rates. *See* Pub. L. 96-448 § 214(a)-(c)(1), 94 Stat. 1913, 1915 (codified at 49 U.S.C. § 11501 (1982)). Under the Staggers Act, states are permitted to regulate intrastate rates only if they follow the standards and procedures of the Interstate Commerce Act. *Id.* Each state's standards and procedures must now be certified by the Interstate Commerce Commission, which is further empowered to review individual decisions of state regulatory agencies. *See, e.g., Utah Power & Light Co. v. ICC*, 764 F.2d 865, 867-68 (D.C. Cir. 1985).